Bengjaya Sdn Bhd v Mohd Fauzi bin Ahmad & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR EXECUTION NO 36–4 OF 2010
HUE SIEW KHENG J
9 APRIL 2012

Civil Procedure — Amendment — Order — Loss on value of property — Objection by execution debtor — Wrongful caveat — Whether execution creditor failed to prove loss and damages — Whether amended order from assessment of damages valid — Submission of new issues — Whether execution debtor should be allowed to stray from earlier stand — Rules of the High Court 1980 O 46, O 47 rr 6 & 7

Pursuant to an amended order for assessment of damages, the execution debtor ('ED') was ordered by the registrar to pay, inter alia, the sum of RM2,000,000 to the execution creditor ('EC') being the loss on the value of the EC's property. The ED objected the application and argued that the EC failed to prove its loss and damages suffered as a result of the ED's wrongful caveat; the amended order from assessment of damages was invalid as the learned SAR was not entitled to grant interest at the rate of 8% pa on the assessed damages; and that the ED had two pending appeals in the Court of Appeal against the orders of the High Court in allowing the EC's applications to amend the order for assessment of damages, the writ of seizure and sale ('WSS') and the prohibitory order ('PO'). However in submissions before the court, learned counsel for the ED did not submit on the objections raised but instead submitted new issues. It was submitted that the EC was seeking to execute the WSS which was no longer valid as required under O 46 r 6 of the Rules of the High Court 1980 ('RHC'); the EC failed to show that the PO obtained against the subject property had been entered in accordance with s 335 of the National Land Code ('NLC') and did not comply with O 47 r 7(a) of the RHC and the subject property was not even deemed to have been seized under O 47 r 6(3) of the RHC; and that the alleged debt amount was much lesser than the asking reserve price and therefore it was leviable by charge or lease, or sale of a portion only of the subject property or by sale of any other property of the ED. Learned counsel for the EC objected to these new issues being raised and contended that the ED should not be allowed to stray from their earlier stand that these execution proceedings were regular as they had never in their affidavits averred to the irregularity or invalidity of the execution proceedings and whilst the EC had deposed affirmatively in its affidavits that the WSS and PO were valid and

A have been validly extended, the ED had not specifically rebutted these positive averments of the EC.

Held, allowing the application:

B (1) The ED's objections were without merit and cannot be sustained. There was no need for the EC to file an application for renewal of the WSS as the said property was seized when the PO was duly presented and registered in the Kuala Lumpur Land Office. Order 46 r 6(1) and (2) of the RHC applies only when the writ had not been wholly executed, C which was not the case here (see para 8(a)).

(2) The WSS was valid at the time of filing this application and the argument that the PO was not duly registered was baseless. The ED's contention that the WSS had lapsed before this application was filed cannot be sustained (see para 8(a)).

D

(3) As for the contention that the alleged debt amount was much lesser than the asking reserve price and hence leviable by charge or lease, the court found that this contention merited no consideration as the ED had not, at any time before the filing of this application, applied under O 47 r 7(c) E of the RHC for postponement of the sale to raise the amount leviable under the writ by charge or lease, or sale of a portion only, of the immovable property seized (see para 8(c)).

[Bahasa Malaysia summary

F Berikutan suatu perintah terpinda bagi taksiran ganti rugi, penghutang penghakiman telah diarahkan oleh pendaftar untuk membayar, antara lain, sejumlah RM2,000,000 kepada pemiutang penghakiman iaitu kerugian pada nilai harta pemiutang penghakiman. Penghutang penghakiman membantah permohonan tersebut dan menghujahkan bahawa pemiutang penghakiman G gagal untuk membuktikan kerugian dan kerosakan yang dialami akibat kaveat salah penghutang penghakiman tersebut; perintah terpinda taksiran ganti rugi adalah tidak sah kerana SAR tidak berhak untuk memberikan faedah 8% setahun ke atas taksiran ganti rugi; dan bahawa penghutang penghakiman mempunyai rayuan yang sedang berjalan di Mahkamah Rayuan terhadap H perintah Mahkamah Tinggi dalam membenarkan permohonan pemiutang penghakiman untuk meminda perintah terhadap taksiran ganti rugi, writ penyitaan dan jualan ('WSS') dan perintah larangan ('PO'). Walau bagaimanapun, dalam hujahannya di hadapan mahkamah, peguam penghutang penghakiman tidak mengemukakan hujahan bagi bantahan yang I dibangkitkan tetapi sebaliknya mengemukakan isu-isu baru. Dihujahkan bahawa pemiutang penghakiman telah berusaha untuk melaksanakan WSS yang tidak lagi sah sebagaimana yang dikehendaki di bawah A 46 k 6 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'); pemiutang penghakiman gagal untuk menunjukkan bahawa PO diperolehi terhadap hartanah yang

menjadi subjek telah dimasukkan selaras dengan s 335 Kanun Tanah Negara ('KTN') dan tidak mematuhi dengan A 47 k 7(a) KMT dan malah hartanah tersebut tidak disifatkan telah disita di bawah A 47 k 6(3) KMT; dan bahawa jumlah hutang yang dikatakan adalah lebih kurang daripada harga rizab yang dipinta dan oleh itu ia boleh dilevi oleh gadaian atau pajakan, atau penjualan sebahagian sahaja hartanah yang menjadi subjek atau penjualan apa-apa harta lain penghutang penghakiman. Peguam penghutang penghakiman membantah isu-isu baru yang dibangkitkan dan menghujahkan bahawa penghutang penghakiman tidak harus dibenarkan tersasar daripada hujahan awal mereka bahawa prosiding pelaksanaan adalah teratur kerana mereka tidak pernah dalam afidavit mereka menghujahkan ketidakteraturan atau ketidaksahan prosiding pelaksanaan dan walaupun pemiutang penghakiman telah memberi keterangan secara afirmatif dalam afidavitnya bahawa WSS dan PO adalah sah dan telah dilanjutkan secara sah, penghutang penghakiman tidak secara khususnya mematahkan hujahan-hujahan positif pemiutang penghakiman.

Diputuskan, membenarkan permohonan:

(1) Bantahan penghutang penghakiman adalah tanpa merit dan tidak boleh dikekalkan. Pemiutang penghakiman tidak perlu memfailkan permohonan bagi pembaharuan WSS kerana harta tersebut telah disita apabila PO telah dikemukakan dan didaftarkan di Pejabat Tanah Kuala Lumpur. Aturan 46 k 6(1) dan (2) KMT terpakai hanya apabila writ tidak dilaksanakan sepenuhnya, yang mana tidak berlaku dalam kes ini (lihat perenggan 8(a)).

(2) WSS adalah sah pada masa pemfailan permohonan ini dan hujahan bahawa PO telah tidak didaftarkan dengan sewajarnya adalah tidak berasas. Hujahan penghutang penghakiman bahawa WSS telah luput sebelum permohonan ini telah difailkan tidak boleh dikekalkan (lihat perenggan 8(a)).

(3) Bagi hujah bahawa dakwaan jumlah hutang adalah lebih kurang daripada harga rizab yang dipinta dan justeru boleh dilevi oleh gadaian atau pajakan, mahkamah mendapati bahawa hujahan ini tidak mempunyai sebarang balasan kerana penghutang penghakiman tidak pernah, pada bila-bila masa sebelum pemfailan permohonan ini, memohon di bawah A 47 k 7(c) KMT bagi penangguhan jualan untuk menaikkan jumlah yang boleh dilevikan di bawah writ melalui gadaian atau pajakan, atau penjualan sebahagian sahaja, harta tak alih yang disita (lihat perenggan 8(c)).]

Notes

For cases on order, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 643–650.

Cases referred to

Meenambal (F) v Tan Kee Chong [1934] MLJ 280 (folld)

Syarikat Palaykat Madras v Asgar Ali bin Fakhruddin Kagdi [1998] MLJU 535; [1998] 1 LNS 582, HC (folld)

Legislation referred to

National Land Code ss 334, 335, 336, 337, 338, 339

Rules of the High Court 1980 O 46 rr 6, 6(1), (2), O 47 rr 6(3), 7(a), (c)

Selena Kong (Raymond Mah with her) (Mah Weng Kwai & Associates) for the plaintiff.

Anas bin Fauzi (M Raman & Associates) for the defendant.

Hue Siew Kheng J:

DECISION (ENCL 36)

[1] Enclosure 36 is the execution creditor's ('EC') application for an order for sale of the execution debtor's ('ED') property held under GRN 525 of Lot 54857 Mukim Kuala Lumpur.

The application is filed pursuant to O 46–47 of the Rules of the High Court ('RHC') 1980 read together with ss 334–339 of the National Land Code ('NLC').

BRIEF BACKGROUND

[2] Pursuant to an amended order for assessment of damages dated 4 August 2009, the learned registrar had ordered the ED to pay, inter alia, the sum of RM2,000,000 to the EC being the loss on the value of the EC's property.

[3] The ED in objecting to the application, had averred, inter alia, the following:

(a) the EC has failed to prove its loss and damages suffered as a result of the ED's wrongful caveat;

(b) the amended order from assessment of damages is invalid as the learned SAR was not entitled to grant interest at the rate of 8%pa on the damages she had assessed; and

(c) the ED have two pending appeals in the Court of Appeal against the orders of the High Court allowing the EC's applications to amend the order for assessment of damages, the writ of seizure and sale ('WSS') and the prohibitory order ('PO').

[4] However in submissions before me, learned counsel for the ED did not submit on the objections raised but had submitted on the following new issues: A

(a) the EC is seeking to execute the WSS which is no longer valid as required under O 46 r 6 of the RHC 1980;

(b) the EC has failed to show that the PO obtained against the subject property has been entered in accordance with s 335 of the NLC and did not comply with O 47 r 7(a) of the RHC and the subject property is not even deemed to have been seized under O 47 r 6(3) of the RHC; and B

(c) the alleged debt amount is much lesser than the asking reserve price and therefore it is leviable by charge or lease, or sale of a portion only of the subject property or by sale of any other property of the ED. C

[5] Learned counsel for the EC is vigorously objecting to these new issues being raised. A further affidavit was allowed to be filed by the EC to rebut the ED's contention that the PO has not been entered in accordance with s 335 of the NLC, wherein a copy of the land search of the ED's property held under GRN No 52509 Lot No 54857 was exhibited to prove that the PO has been duly registered in the Kuala Lumpur Land Office. D

E

[6] In any event, learned counsel for the EC contends, the ED should not be allowed to resile from their earlier stand that these execution proceedings are regular as they had never in their affidavits averred to the irregularity or invalidity of the execution proceedings.

F

[7] Whilst the EC has deposed affirmatively in its affidavits that the writs of execution (the WSS and PO) are valid and have been validly extended the ED have not specifically rebutted these positive averments of the EC.

G

[8] I concur with the submission of learned counsel for the EC that the contentions of the ED that these execution proceedings are invalid cannot be sustained. The reasons are as follows:

(a) there is no need for the EC to file an application for renewal of the WSS as the said property was seized on 11 June 2010 when the PO was duly presented and registered in the Kuala Lumpur Land Office. Order 46 r 6(1)–(2) of the Rules of the High Court applies only when the writ had not been wholly executed, which is not the case here. H
As was held in *Syarikat Palaykat Madras v Asgar Ali bin Fakhruddin Kagdi* [1998] MLJU 535; [1998] 1 LNS 582: I

> The mode of seizing immovable property of a judgment debtor under a writ of seizure and sale in civil suit is by registering under the Registration of Deeds Ordinance (Chapter 121) and Order of Court.

In Syarikat Palaykat the court had referred to, inter alia, an earlier case (*Meenambal (F) v Tan Kee Chong* [1934] MLJ 280) which held that a writ of seizure and sale so far as it affected immovable property is executed by the Sheriff as soon as the order attaching the interest of the judgment debtor is registered and notice given to him and it is immaterial whether or not the seizure is completed by the sale of the property seized.
Jeffrey Tan J (as he then was) in *Syarikat Palaykat* observed:

> Both cases were under the old civil procedure. Yet, nothing has changed after all these years. Seizure of immovable property is still effected by registering a court order — O 47 r 6 of the Rules of the High Court 1980 provides that the seizure of any immovable property or any registered interest therein 'shall be made by an order prohibiting the judgment debtor from transferring, charging or leasing such property and interests' but that such immovable property [10] or registered interest shall not be deemed to have been seized until such prohibitory order shall have been registered at the registry of titles or land office whereat the land or interest in land specified in such order is registered. A writ of seizure and sale is still renewable — O 46 r 6 provides for the extension of the validity of a writ of seizure and sale that 'has not been wholly executed'.

Further on in his judgment, he elucidated as follows:

> But what is 'seizure not completed or carried into effect'? Obviously, where nothing has been seized, then the writ of execution has not been executed. By the same reasoning, where anything has [11] been seized, then the writ of execution has been wholly executed, and where not everything has been seized, then the writ of execution has not been wholly executed. And that writ of execution not wholly executed is only required to be extended, not otherwise, if any further property of the judgment debtor is to be seized in execution, after 12 months from the date of the issue of the writ. With regard to the property already seized, and in all other cases where the execution process has commenced within 12 months, the validity of the writ execution, like the validity of a summons that has been served but yet not adjudicated, is no longer an issue.

Applying the principles laid down in the cited cases, I find the WSS valid at the time of filing this application and exh 'MFY3' of the EC's affidavit in support shows the validity of the WSS and the PO have been extended to 11 November 2011. The ED's contention that the WSS had lapsed before this application was filed cannot be sustained.

(b) similarly the argument that the PO was not duly registered is baseless as the contrary is evidenced by exh 'MFY5' of the affidavit in support and exh 'SK2' which show that the prohibitory order was duly presented and registered in the Kuala Lumpur Land Office on 11 June 2010; and

(c) as for the contention that the alleged debt amount is much lesser than the asking reserve price and hence leviable by charge or lease, I find that this contention merits no consideration as the ED have not, at any time

before the filing of this application, applied under O 47 r 7(c) of the RHC for postponement of the sale to raise the amount leviable under the writ by charge or lease, or sale of a portion only, of the immovable property seized. I see no reason why this court should lend its aid to an indolent litigant.

[9] In view of the foregoing, I am of the firm view that the ED's objections to encl 36 are without merit and cannot be sustained. Order in terms of encl 36 was granted.

Application allowed.

Reported by Afiq Mohamad Noor